No. 78-388

In the Supreme Court of the United States

OCTOBER TERM, 1978

TEX-LA ELECTRIC COOPERATIVE, INC., and
SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.,
PETITIONERS

v.

JAMES R. SCHLESINGER, SECRETARY OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. 3a-4a) and the order of the district court (Pet. App. 6a-7a) are not reported. The orders of the Federal Power Commission (Pet. App. 8a-19a) are reported at 45 F.P.C. 183 and 394.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1978. A petition for rehearing was denied on June 8, 1978. The petition for a writ of certiorari was filed on September 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Department of the Interior and the Federal Power Commission gave proper consideration to the factors set forth in Section 5 of the Flood Control Act of 1944 in proposing and approving the hydroelectric power rate increases challenged in this case.

2. Whether the requirements of due process were satisfied by the procedures employed by the agencies in proposing and approving the challenged rate increases.

STATEMENT

The Southwestern Power Administration ("SPA") was established by the Secretary of the Interior[1] in 1943 to market the hydroelectric power generated at

[1] The Secretary of the Interior has been named as one of the federal respondents throughout this litigation. The issues involved in this case will continue to be determined under the statutes setting forth the authority of the Secretary of the Interior. See note 7, *infra*. Pursuant to Section 705 (e) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 607, however, we have substituted the Secretary of Energy for the Secretary of the Interior as the principal respondent in this petition.

certain projects of the Army Corps of Engineers. The SPA markets the entire hydroelectric output of one of these projects, the Narrows Dam, to petitioner Tex-La Electric Cooperative, Inc. ("Tex-La"). The entire output of another project, the Sam Rayburn Dam, is marketed to petitioner Sam Rayburn Dam Electric Cooperative, Inc. ("Sam Rayburn"). The hydroelectric power generated by these two projects is disposed of pursuant to Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, which provides, in pertinent part, that

> the Secretary of the Interior * * * shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery * * * of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years.

In its 30-year history of marketing federal power, SPA has consistently failed to recover the costs of the projects assigned to its administration. The rates adopted by SPA have not recovered any of the principal investment of the United States of $453,600,000 in power operation and transmission facilities. Moreover, a deficit of approximately $37,700,000 in inter-

est on this principal had accrued as of June 30, 1969 (J.A. 290-291).[2] Accordingly, by order of August 15, 1968, the Federal Power Commission approved SPA system rate schedules until only September 1, 1969. 40 F.P.C. 291. The FPC called on the Secretary of the Interior and SPA " 'to make an overall review' " of SPA's operations and " 'to work out modifications of [SPA's] rate structures and contractual arrangements which are necessary to comply with the Flood Control Act of 1944' " (J.A. 291).

The rates challenged in this case were issued after the determination of SPA's Administrator that annual deficiencies existed with respect to the particular SPA projects from which petitioners obtain federal power.

1. The Narrows Project Rate Increase

Since September 1960 the entire output of the Narrows Dam had been sold to Tex-La. SPA's "Average Rate and Repayment Study—Narrows Dam—April 1970" indicated that, as of June 30, 1969, the Narrows Project had accrued a deficiency of over $819,000 (J.A. 295). The Secretary of the Interior approved the study and, on May 22, 1970, transmitted it to the Federal Power Commission with a request to increase the rate from $368,000 to $468,000 per year (J.A. 903-904). A copy of the study and the Secretary's transmittal were sent to Tex-La, which was notified of

[2] "J.A." refers to the 3-volume Joint Appendix filed in the court of appeals.

its opportunity to submit comments (J.A. 295-296). Tex-La submitted its comments to the FPC, protesting the proposed rate on a number of grounds. As a result of SPA's analysis of comments received, the Secretary of the Interior submitted to the FPC a revised proposed rate lowering the increase by $3,000 per year (J.A. 299, 889-890). The FPC approved the proposed rate increase as revised (Pet. App. 15a-19a).

Tex-La filed with the FPC a petition for rehearing (J.A. 864-869), and the FPC granted rehearing "for the purpose of giving further consideration to the matters set forth in [Tex-La's] petition" (J.A. 853-854). On April 29, 1971, the FPC rejected Tex-La's arguments and reaffirmed its approval of the revised rate (J.A. 846-849).[3]

2. The Sam Rayburn Project Rate Increase

Petitioner Sam Rayburn has purchased the entire output of the Sam Rayburn Dam project ever since the dam began producing power. A study titled "Average Rate and Repayment Study—Sam Rayburn

[3] A review of the costs associated with the Narrows Dam revealed that the rates charged to Tex-La still were insufficient to comply with the congressional mandate regarding repayment of project costs. For example, the rate increase in 1971 was based on the Corps of Engineers' estimate that operating and maintenance expenses for the period of 1971-1974 would be $604,000. The actual expenses for these years totaled $774,719. Similarly, while SPA's general administrative expense was estimated at $74,128, the actual expense was $80,812 (J.A. 303). As the result of these and other increases in costs, a further increase in the rate for Narrows Dam power was approved by the FPC in August 1976.

Dam—April 1970" indicated that from July 1, 1966, when commercial operation began, through June 30, 1969, federal revenues were $505,665 less than operating costs and capital charges. SPA determined from this study that an annual charge of $1,050,150 was required to recover the deficit that had accrued and to meet estimated operating costs and capital charges in the future (J.A. 305-306). Accordingly, on June 2, 1970, the Department of the Interior transmitted to the FPC a request for confirmation and approval of a new rate schedule for the sale of power and energy generated at the Sam Rayburn Dam in the amount of $1,050,150 per year, an increase of $100,-150 per year over the previous rate (J.A. 306).

After an intensive review of SPA's repayment study procedures, which considered criticisms by Sam Rayburn, among others, Interior advised the FPC that it was modifying its proposed rate increase downward from $1,050,150 per year to $1,030,000 per year (J.A. 307-308; 950-954; 979-980). In a letter dated January 28, 1971, the FPC invited petitioner Sam Rayburn to submit comments on the proposed rate as modified (J.A. 959). Sam Rayburn did not submit comments but, instead, sought an extension of time. On March 5, 1971, the FPC approved the proposed rates and denied petitioners' request for a further extension of time (J.A. 945-951). The Commission indicated that it could not further "ignore the responsibility of [SPA] to avoid delays in complying with

the Congressional directions respecting the revenue needs of the Project." [4]

3. Judicial Review

Petitioners commenced these consolidated actions, seeking judicial review of the 1971 rate increases. The government presented affidavits to explain how the cost estimates were made (J.A. 329-350) and how the data obtained from the Corps of Engineers were evaluated by the Department of the Interior and then subjected to further review on submission to the FPC (J.A. 289-328). James J. Stout, Chief of the FPC's Division of River Basins, explained that the proposed rates were subjected to independent and detailed review at the FPC and that the cost allocations were studied to insure "that those buying power paid only for power" (J.A. 396). The reasonableness of overhead and administrative expenses were tested along with interest, amortization, and replacement expenses. The proposed rate was also tested for commercial reasonableness against prices for alternative sources (J.A. 395-397).

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[4] As with the Tex-La project, the rate approved for the Sam Rayburn Dam project in 1971 proved insufficient. The proposed rate increase was based on a Corps of Engineers' estimate of operating and maintenance costs of $599,200 for the period 1971-1974. The actual expenses proved to be $742,253. SPA general and administrative expenses for 1971-1974 were estimated at $228,800; actual expenses were $262,002 (J.A. 311-312). A request for a further increase in the rate for Sam Rayburn Dam power is pending before the Secretary of Energy.

On this record, the district court granted summary judgment to the defendants, concluding that the rates comported with the requirements of Section 5 of the Flood Control Act and that ample and fair processes had been accorded to petitioners (Pet. App. 6a-7a). The court of appeals affirmed (*id.* at 3a-4a).

ARGUMENT

1. *a.* Petitioners urge (Pet. 15-18) that the challenged rates must be set aside because the Secretary of the Interior and the FPC did not sufficiently articulate the basis for the rate increases. They contend that the agencies did not consider the standards of Section 5 of the Flood Control Act of 1944 in approving the challenged rates. The substantial administrative record establishes, however, that increased operating costs and capital charges formed the basis for the rate increases.

In approving the rate increase for the Narrows Dam Project, the FPC stated (Pet. App. 18a) that the previously effective rate had failed to

> comply with the requirements of the Flood Control Act of 1944, Section 5, that rate schedules "shall be drawn having regard to the * * * amortization of the capital investment over a *reasonable* period of years" (emphasis supplied).

The Commission concluded that the increased rates proposed for the Narrows Dam and Sam Rayburn projects were necessary to recoup projected operating charges and to amortize the investment in power facilities over a 50-year period (Pet. App. 10a-11a, 14a, 19a). Although the Commission's Orders do not expressly invoke every element of the statutory standard,[5] the basis for the agency's action is clear and intelligible. There is no need for any additional articulation. See *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 595 (1945). See also *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281, 286 (1974); *Erie-Lackawanna R.R. Co.* v. *United States*, 279 F. Supp. 316, 354-355 (S.D. N.Y. 1967), aff'd *sub nom. Penn Central Merger Cases*, 389 U.S. 486 (1968).[6]

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[5] Petitioners assert (Pet. 15) that the administrative record fails to reveal that the FPC considered whether the challenged rates would achieve the " 'most widespread use' " of project power, as Section 5 provides. See 16 U.S.C. 825s. This language in Section 5, however, preserves the exercise of the widest administrative discretion by the Secretary and provides no judicially enforceable standards. See *Strickland* v. *Morton*, 519 F.2d 467, 469-470 (9th Cir. 1975). In any event, the widespread use requirement refers to the manner in which the power is ultimately transmitted and utilized; the statutory rate requirement is set forth in the different portion of Section 5 specifying that rates shall be set at the lowest possible levels having "regard to the recovery * * * of the cost of producing and transmitting such electric energy, including the amortization of the capital investment * * *." 16 U.S.C. 825s. The agency's enquiry focused properly on the statutory rate-setting standards.

[6] Petitioners' reliance (Pet. 16-17) on *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957), and *FPC* v. *Texaco, Inc.*, 417 U.S. 380 (1974), is unavailing. In *Schaffer* the Court stated that the Interstate Commerce Commission had acted without considering a "critical factor" of the National Transportation Policy established to guide its decision-

Moreover, because the contested rates in this proceeding concern the sale of public property, they are not subject to the procedural requirements of the Administrative Procedure Act, including the requirement of a "concise general statement" of the basis for agency action. See 5 U.S.C. 553(a)(2); 5 U.S.C. 553(c).[7] Petitioners' contention (Pet. 18) that formal findings should nonetheless be required in this case is not supported by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), on which they rely. In *Overton Park* the Court stated only that "although formal findings may be required in some cases in the absence of statutory directives when the nature of the agency action is ambiguous, those situations are very rare." *Id.* at 417. Here, however, there is no ambiguity about the basis for the administrative action. As the court of appeals correctly observed, these "are cost recovery rate increases" that are designed to recover operating and capital charges pursuant to Section 5 of the Act (Pet. App. 3a).

b. Petitioners contend that the agency improperly included, as part of the operations charges to be recovered by the rate increase, expenses designed for recreation and wildlife activities associated with one of the two dam projects (Pet. 13). We agree with petitioners that Section 5 does not authorize the recovery of non-power costs from hydroelectric power customers. This specific objection was not, however, urged by petitioners in opposition to the entry of summary judgment in the district court or in the court of appeals, and it is thus not properly presented for review in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the FPC has subsequently reviewed petitioners' allegation and concluded that, while the costs involved were placed as an accounting matter in a recreation account, the charges were in fact related to the provision of power at the project. FPC Order, Docket No. E-6943, Aug.

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making. 355 U.S. at 90. Here, however, it is apparent that the "critical" statutory factors were the basis for the agency's determination that a rate increase should be approved. In *Texaco* the Court remanded for further proceedings where the Commission had erroneously concluded that a statutory requirement was inapplicable to its particular action in that case. 417 U.S. at 394-395. There is, however, no suggestion in this case that the agency refused to consider any of the statutory requirements of Section 5 in its approval of the rate increases.

[7] On October 1, 1977, the power marketing functions of the Secretary of the Interior were transferred to the Secretary of Energy. Section 302(a)(1)(E), 91 Stat. 578. Under the Organizational Act of the Department of Energy, the exemption from rulemaking requirements established in 5 U.S.C. 553(a)(2) for matters relating to public property and contracts is no longer available. Section 501(b)(3), 91 Stat. 588.

The removal of the rulemaking exemption is, however, irrelevant to the proper disposition of this case. The Department of Energy Organization Act is not intended to apply to pending litigation. Section 705(c) of the Act, 91 Stat. 607, provides that:

> the provisions of this Act shall not affect suits commenced prior to the date this Act takes effect, and * * * in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this Act had not been enacted.

Since this suit commenced prior to October 1, 1977, judgment in this case is to be rendered "in the same manner and effect as if this Act had not been enacted." *Ibid.*

10, 1976, at 8. Petitioners' failure to raise this specific claim in the courts below prevents the determination of this essentially factual issue on this record.

2. Petitioners contend (Pet. 18-32) that they were denied an appropriate opportunity to contest the basis for the challenged rates, both before the agencies and in the courts.

The court of appeals correctly concluded (Pet. App. 4a) that the agency proceedings fully comported with due process requirements. Petitioners were afforded due notice of the rate increases and the basis therefor, and they were given an opportunity to submit written comments on the proposed increases. In the context of this ratemaking proceeding, the requirements of due process were thus fully satisfied. *Associated Electric Cooperative, Inc.* v. *Morton*, 507 F. 2d 1167 (D.C. Cir. 1974). See *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973). Moreover, as we pointed out above, this case involves the disposition of public property, and the agency's action was therefore not subject to the procedural requirements of the APA. Because, at the time these rates were approved, there was no statute specifying any procedures to be employed by the agency in adopting rates for the sale of federal power, there is no basis for petitioners' claim that additional hearing procedures should have been utilized. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 547-549 (1978).

Petitioners argue, nonetheless, that a trial-type proceeding should have been held in the district court as

part of a de novo review of the validity of the agency's rate determination (Pet. 14-30). They contend that such a proceeding is authorized by Section 10(e) of the APA, which provides in part that courts may "hold unlawful and set aside agency action, findings, and conclusions found to be—* * * (F) unwarranted by the facts to the extent the facts are subject to trial de novo by the reviewing court." 5 U.S.C. 706(2)(F). This Court has never held, however, that the facts underlying an informal rulemaking proceeding are subject to trial de novo in the reviewing court. Indeed, as petitioners concede, in *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra*, the Court held that de novo review is permissible only (1) where the action is adjudicatory in nature and the agency's fact-finding procedures are inadequate, and (2) when issues not before the agency are presented in enforcement proceedings. 401 U.S. at 415.[8] Since this case involves a rulemaking, rather than an adjudicative or enforcement proceeding, de novo review is not appropriate. The determination of the appropriate rate

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[8] Petitioners suggest that the Court should reexamine this aspect of its decision in *Overton Park* in light of legislative history that petitioners believe supports a broader construction of the de novo review provision of 5 U.S.C. 706(2)(F). But the history to which petitioners refer (Pet. 20-21) concerns the situation where no agency hearing precedes the promulgation of a challenged rule. Here, however, the agency conducted an informal rulemaking investigation and received evidentiary submissions from petitioners as well as the Corps of Engineers. This hearing procedure is ample for informal rulemaking.

to be charged in the disposition of federal hydroelectric power is assigned to the agency process; the function of judicial review is to determine that the agency has not acted arbitrarily or capriciously or otherwise not in accordance with law. 5 U.S.C. 706(2)(A). This limited judicial enquiry may properly be conducted on the basis of the record contested before the agency. An adversary, trial-type presentation of competing technical and economic data before the district court would be both unnecessary and inappropriate for this purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1978

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